

**IN THE COURT OF APPEALS**  
**FIRST APPELLATE DISTRICT OF OHIO**  
**HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-130369
Plaintiff-Appellee,	:	TRIAL NO. B-0408159A
vs.	:	
DAVID FOSTER,	:	<i>JUDGMENT ENTRY.</i>
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* S.Ct.R.Rep.Op. 2; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Defendant-appellant David Foster appeals from the Hamilton County Common Pleas Court’s judgment overruling his “Motion to Vacate and Set Aside a Void Sentence.” We affirm the court’s judgment.

Foster was convicted in 2005 of conspiracy, drug possession, and drug trafficking. In his direct appeal, we vacated his sentences and remanded for resentencing in light of the Ohio Supreme Court’s decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. *State v. Foster*, 1st Dist. Hamilton No. C-050378, 2006-Ohio-1567, *appeal not accepted*, 110 Ohio St.3d 1439, 2006-Ohio-3862, 852 N.E.2d 188. Then, in his appeal from his 2006 resentencing, we vacated his sentences and remanded for merger consistent with R.C. 2941.25. *State v. Foster*, 1st Dist. Hamilton No. C-060720 (June 27, 2007), *affirmed*, 118 Ohio St.3d 265, 2008-Ohio-2542, 888 N.E.2d 411. On remand, the trial court merged the possession and

conspiracy charges into the trafficking charge and sentenced Foster for trafficking only. We affirmed that conviction on appeal. *State v. Foster*, 1st Dist. Hamilton No. C-080929 (Aug. 8, 2009), *appeal not accepted*, 123 Ohio St.3d 1511, 2009-Ohio-6210, 917 N.E.2d 812.

Foster mounted unsuccessful postconviction challenges to his convictions in 2006, 2007, and 2013. *See State v. Foster*, 1st Dist. Hamilton No. C-070518 (June 11, 2008), *appeal not accepted*, 119 Ohio St.3d 1488, 2008-Ohio-5273, 894 N.E.2d 1245; *State v. Foster*, 1st Dist. Hamilton Nos. C-060065 and C-060121 (Jan. 10, 2007). In this appeal from the overruling of his 2013 motion, he advances two assignments of error. He asserts that the common pleas court erred in overruling the motion. And he contends that “[t]he trial court committed plain error in sentencing [him] concurrently for trafficking and conspiracy.” Upon our determination that the common pleas court had no jurisdiction to entertain the motion, we overrule the assignments of error.

In his motion, Foster sought resentencing for “trafficking/possession and conspiracy because they are allied offenses of similar import,” subject to merger under R.C. 2941.25. He did not designate the statute or rule under which he sought relief. R.C. 2953.21 et seq., governing the proceedings on a petition for postconviction relief, provide “the exclusive remedy by which a person may bring a collateral challenge to the validity of a conviction or sentence in a criminal case.” R.C. 2953.21(J). Therefore, the motion was reviewable under the standards provided by the postconviction statutes. *See State v. Schlee*, 117 Ohio St.3d 153, 2008-Ohio-545, 882 N.E.2d 431, ¶ 12. But the postconviction statutes did not confer upon the common pleas court jurisdiction to entertain the motion on its merits, because Foster, with his late and successive

postconviction motion, failed to satisfy the jurisdictional requirements of R.C. 2953.21(A)(2) or R.C. 2953.23(A)(1).

A court retains jurisdiction to correct a void judgment. *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263, ¶ 18-19. But the trial court, on remand, sentenced Foster in conformity with R.C. 2941.25, when it merged the possession and conspiracy charges into the trafficking charge and sentenced him for trafficking only. Thus, Foster's 2008 judgment of conviction did not require correction.

Because the common pleas court had no jurisdiction to entertain Foster's postconviction motion, the motion was subject to dismissal. *See* R.C. 2953.21(C) and 2953.23(A). Accordingly, upon the authority of App.R. 12(A)(1)(a), we modify the judgment appealed from to reflect the dismissal of the motion. And we affirm the judgment as modified.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

**CUNNINGHAM, P.J., HILDEBRANDT and HENDON, JJ.**

To the clerk:

Enter upon the journal of the court on February 26, 2014

per order of the court \_\_\_\_\_.  
Presiding Judge